FORT SAM HOUSTON LEGAL ASSISTANCE OFFICE
WILLS AND ESTATES

Welcome to the Fort Sam Houston Legal Assistance Office. This information sheet will explain some of the terms and questions used in estate planning and prepare you to discuss your needs and desires with an attorney. The will worksheet, which is a related form you can pick up from our office, is used to help us simplify the process of preparing a will for you. All clients need the will worksheet to establish an estate plan. Although the will worksheet does take considerable time to complete, making a will is a serious undertaking with long lasting implications. Fully completing the will worksheet will give the attorney much needed information to properly plan your estate. Therefore, it is recommended you have a will worksheet well in advance of your appointment.

I. **WHAT IS A WILL?** A will is a legal document, which states your desires concerning what will happen to your property after your death. A will also contains other specific directions from you concerning who is to implement your instructions and, perhaps, who will care for any minor children you may leave behind.

II. **DO YOU NEED A WILL?** Generally, anyone who owns real estate or other property held with a document of title, or who has an estate greater than $50,000.00, should generally have a will. Most people with minor children will want to have a will. Not only can a guardian and alternate guardian for minors be named in a will, but a trust for minors can be established as well. Naming a guardian simplifies the process of having a guardian appointed by the court and can save the expenses of posting a bond. A trust ensures that money from the estate can be used for the benefit of any children and provides a mechanism for holding and administering money "poured over" from life insurance. Leaving money directly to a relative or trusted friend to provide for minor children, rather than establishing a trust, can cause unforeseen problems. For instance, if the adult becomes incompetent, his or her guardian will be restricted, in most cases, to using the money for the benefit of the incompetent, rather than for the children. Or worse, the money can become subject to the debts of the person named—including fees and debts resulting from lawsuits against them. Finally, in Texas, if you are married with children, you may need a will if you want your spouse to receive the whole estate. This is especially critical if at least one child is not also the child of his or her spouse.

Making a will is **entirely voluntary**; you cannot be required to make a will, even prior to deployment. Contrary to popular belief, if you die without a will, your property does not go to the state, unless you have no surviving kin. Instead, each state has "laws of intestacy" which determine who will receive property and in what proportion when a party dies without a will. Although these laws vary somewhat, generally your property would be distributed as follows:

- If you are single, and have no children, your biological parents would split your property equally, even if they are no longer married;
- In some states, if you are married and have no children, your surviving spouse receives all property acquired *during* the marriage, and your parents receive the remainder;
- In other states, if you are married and have no children, your surviving spouse receives all of your property;
- If you are married and have children, your surviving spouse and children may divide the property. However, the law may require something other than an even split *(that is, the spouse may get only 1/3, and the children receive 2/3)*

Depending upon where you are domiciled and/or where your legal state of residence has been established ***may*** have an effect on the probate of your estate. States have differing probate laws and procedures. In addition to the differences in the division of property, some states may require an affidavit from the testator in addition to witnesses to the will while other States will not require such affadavits. Therefore, it is advisable to seek legal counsel and discuss your legal state of residence as compared to your current duty station domicile. As discussed above, however, most people should have a will drafted to make their final intentions clear and prevent state law from dividing the estate. Executing a will is the only way to make sure your final intentions are clear.

III. **SIMPLE WILLS ONLY**: The Legal Assistance Office prepares only simple wills. If you have an estate worth over the federal estate tax threshold (including life insurance benefits), then you should contact an attorney who specializes in estate planning. The 2005 federal estate tax threshold is only applicable for estates over $1,500,000. However, in 2006, this amount will increase to $2,000,000. There are substantial federal gift and estate tax consequences on estates over those amounts. Estates of less than federal estate tax threshold generally do not require complicated planning techniques to address or avoid the federal estate tax. This threshold applies to individuals or the combined estates of married couples including community property, separate property, and life insurance. Individuals and married couples with assets over the federal threshold should consult with an estate planner. Considerable tax savings can be achieved from proper estate planning for large estates. Therefore, a simple will is not a sufficient and prudent solution in such cases.

However, even couples with assets less than the federal threshold may want to consult an estate planner. For instance, a spendthrift trust can protect a surviving spouse from the claims of creditors, including those resulting from lawsuits. Additionally, specific trusts may need to be established for incompetent adult children or other relatives. Contingent trusts for minor children, however, are routinely prepared and included in the simple wills prepared by most military legal offices. Be sure to obtain the specific language for designating the trustee as beneficiary of life insurance if you want insurance proceeds to be paid into such a trust.

IV. **WHAT ABOUT LIFE INSURANCE PROCEEDS (AND OTHER LIMITATIONS ON A WILL)?** Proceeds of insurance policies are distributed as you have designated in the insurance policy, although they are usually taxed as part of your estate. Insurance beneficiaries are listed on the policy and are not affected by the will. Your will is a written legal document providing for the disposition of all your property that you have not disposed of by other means. Insurance is always payable to the beneficiary named in the insurance policy.

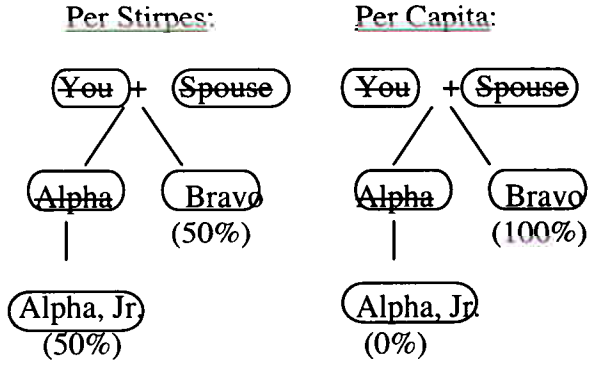
Property that you own jointly with another person will normally go to the other joint owner. Such property is usually not controlled by your will, as you can only give away what you own outright.

If you have minor children and you plan to leave insurance proceeds (including the SGLI) to them ***in trust***, your insurance policy must be specific: ***"My trustee(s) (_____fill in names_____) to fund a trust established for the benefit of my child(ren) (_____fill in names_____) under my will."***

V. **WHAT ABOUT SPECIAL GIFTS?** A special gift (or "Specific Bequest") is a gift of a particular item to a certain person, charity, or corporation. For example, "I give my 1969 red Mustang convertible to my brother, Douglas W. Greene." Specific bequests should be limited to important, valuable items. Be sure to describe the particular item with as much specificity as possible, to avoid any confusion when your will is probated. In the vast majority of cases, it is best to just leave your personal property as a whole to one or more beneficiaries. If the beneficiaries disagree about how items will be divided, your Executor will have the power to decide. You can also leave a separate letter of instruction to guide your Executor. Although the letter is not legally binding, letters of instruction are generally followed. Not only does a letter of instruction guide the Executor in the distribution of property but it also allows you to change the document from time to time if you acquire and/or sell personal property. If you decide to draft a letter of instruction, discuss this with your attorney and let your Executor know that you have left a letter of instruction with your will.

VI. WHAT IS THE "RESIDUARY ESTATE"? Your estate is all your property, including real property (houses, land), tangible personal property (furniture, clothing), and intangible personal property (stocks, bonds, accounts). The residuary estate is composed of everything not specifically bequested or disposed of separately (like an insurance policy). For most people, the residuary estate is the bulk of your will. The first beneficiary (or beneficiaries) will receive the entire residuary estate; then, the second beneficiary (or beneficiaries) will take the residuary estate if the first beneficiary (or beneficiaries) shall not survive the testator (you).

VII. WHAT IS PER STIRPES AND PER CAPITA? When leaving your estate to your children, you generally have two choices for dividing the estate: (1) Per Stirpes, and (2) Per Capita. To explain these options, imagine that you have two children, Alpha and Bravo:



The real difference in the two schemes listed above is how the estate will be divided among grandchildren. If you leave your estate per stirpes, then grandchildren are only entitled to the share their parent would have received in the will; for example, if Alpha and Bravo both predeceased the testator,

then Alpha's children will split his one-half share, and Bravo's children will split his one-half share, even if they have a different number of children. If you leave your estate per capita, grandchildren are excluded if any child of the testator survives, as shown above. Feel free to discuss these two schemes with your attorney.

VIII. WHAT IS AN EXECUTOR? An Executor (also known as a "personal representative" in some states) is the person whom you name in your will to carry out your desires, as expressed in your will, and to settle your estate. Once the estate has been settled, the Executor's duties are ended. Settlement includes paying from your estate any taxes and valid debts you may owe. Usually, a married person names his or her spouse as Executor, but there is no requirement to do so. Often a security fee, or bond, is required of this person; however, most states allow you to specify in your will that you want the fee waived. Your Executor is entitled to a fee for his or her services out of the proceeds of the estate. Your Executor may also hire someone else to meet the Probate Court's requirements, with costs to be paid out of the proceeds of your estate. Your Executor will have an important role -- choose him or her with care, and discuss the matter with him or her. Be sure that the person you name is one you trust.

IX. WHAT TO DO ABOUT MINOR CHILDREN? There are two issues you should decide in your will if your children are minors: (1) Who will raise them, and (2) Who will handle the property and money they inherit.

Foremost, you should name a legal guardian in your will. A guardian is the person who will act as the parent for any of your children who are minors when you die. Normally, if your spouse survives you, (s)he becomes the children's guardian if (s)he is the biological or adoptive parent of the children. However, it is recommended that you name a guardian and an alternate guardian in the event that both you and your spouse die. If you or your spouse have children not born of your current marriage, you should discuss the situation in detail with an attorney to determine the most appropriate way to provide for the children. After you have established a guardian of your children, finding a "guardian" of the property is next.

One way to guard the assets of your heirs is through the creation of a trust. A trust is similar to a bank account that you create for your children; the property you leave to your children automatically goes into the trust if you establish one. When your child reaches a certain age that you specify in your will, all the money that remains in the account is distributed to the child. You can set up one trust or multiple trusts depending upon the estate size, number of children, and the age of children as well as other factors. A Separate Trust sets up an account for each of your children. For instance, if you have more than one child, each child receives his or her share of the account when (s)he reaches the required age. A Single Trust creates one account that your entire children share and none of the children will receive his or her share until the youngest reaches the distribution age.

There are different types of trusts available for certain circumstances (e.g. a disabled child who has special needs). Your attorney will advise you if a trust is recommended based upon several factors. When considering a trust you may want to consider the following:

- Your personal situation, including age, health and financial status;
- Your family relationships and your family's financial circumstances;

- Personal financial data: personal property, real estate holdings, securities, and other property — as well as your tax situation and any debts or obligations;
- The purpose of the trust: your goals, or what you hope to accomplish by the arrangement;
- The type of trust, and how versatile or flexible your plans are;
- The amount and type of property it will contain;
- The duration, or how long the trust will last;
- The beneficiaries and their specific needs;
- Any conditions that must be met by a beneficiary to receive benefits (such as attaining a certain age);
- Alternatives for disposing of assets in case the trust conditions are not met or circumstances change; and
- The trustee, and the conditions or guidelines under which he or she will function.

Based upon that information, your attorney may recommend that a trust is right for you. Your legal assistance attorney or estate planner may discuss some of the types of trusts available, such as: revocable living trusts, irrevocable living trusts, disclaimer trusts, testamentary trusts, and charitable remainder trusts. Our office is equipped to provide you with basic trust preparation. For example, we will create trusts to funnel life insurance proceeds into accounts for minor children and we will create trusts to protect assets of your heirs and we may be able to provide you with a disclaimer trust depending upon your estate. Unfortunately, we cannot provide you with more specialized estate trust planning due to the amount of complexity and specialized estate planning knowledge required to form such trusts. In those cases, we urge you to consult with a certified estate-planning attorney.

If a trust is right for you, you must choose a Trustee. A Trustee is legally responsible for the account. They will hold legal title to the property "in trust" until it is time for the Trustee to distribute the property to your heirs. A Trustee should be a person in whom you have confidence, someone who knows your heirs and understand their needs. A Trustee need not be someone with vast financial experience since a trust only requires money be placed into an interest bearing account. Prudent judgment must be exercised since a savy Trustee can make the difference in the amount of money available for heirs once the age of majority is met. However, in any case, the Trustee has certain legal duties to your heirs and cannot misuse the property. If a Trustee violates their legal duty, criminal punishment and other legal action may be necessary.

Accordingly, you may wish to inquire if your financial institution offers Trustee services over the trust account(s) that you create in your will. A Trustee, whether a family member or not, will be allowed a "fee" for their services in administering the trust. However, most family members who act as Trustee will not bother with collecting fees from the estate or their fees will be quite minimal. This is in contrast to a financial institution, which will usually charge a set fee to administer the trust. Fees and services vary; therefore, it is wise to contact several persons/places to inquire about their fees, services and references. If you are considering a trust, you should discuss your choice of Trustee with your attorney.

However, there are alternatives to trusts. For example, the Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA) creates custodianships, which are generally recognized in

state law and may be preferable to creating a trust in your will. If one or more of the beneficiaries in your will is a minor, the custodian you appoint establishes an UGMA/UTMA account for each minor. Like a trustee, the UGMA/UTMA custodian will be charged with administering the funds for the benefit of your children. Unlike a trustee, the custodian's duties and responsibilities are defined in state law rather than in your will. Also, unlike a trust, the age at which your child controls his/her inheritance is set by state law, not your will.

X. **DISINHERITANCE**: You are generally free to dispose of your estate as you wish. However, most states have laws, which entitle spouses to at least part of the other spouse's estate. This "statutory share" ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to the children of the decedent.

XI. **WHAT IS PROBATE?** Probate is a court procedure by which a will is proved to be valid or invalid and your property distributed as you have directed in your will. Probate proceedings also address the administration of your estate, taxes, the guardianship of children, etc. A valid will that properly disposes of your property can make this process much easier and cheaper. Fort Sam Houston offers free small estate probate services for anyone with a valid military I.D. card and for an Executor probating a will of anyone who had a valid military I.D. card. In other words, if you die (with a valid military I.D. card) and your Executor does not have a military I.D., (s)he can still take advantage of our probate services. The Executor will be required to gather documents and pay certain fees to the court. Upon an initial meeting with our probate department, the Executor will be given a list of documents to acquire and the current probate court filing costs associated with probating the estate. Probate court filing fees generally cost about $200.

XII. **WHAT IF I BECOME INCOMPETENT?** Accidents, diseases, deterioration of mental processes usually occur without notice. Preparing for possible incompetence is the second important purpose in estate planning. Your will, however, will not take effect unless you die. The Texas Legislature as well as other States have enacted several laws that let you have a voice in decisions that affect your life in the event you lose your capacity to make decisions on your own. These include the durable power of attorney, a designation of a guardian, a durable power of attorney for health care, and a directive to physicians. The legal assistance office has a separate handout to assist you in this planning.